

Lizawati bt Said & Anor v Abdul Halim bin Ishak

HIGH COURT (GEORGETOWN) — CIVIL APPEAL NO PA-12B-28-05
OF 2019
AMARJEET SINGH JC
9 MARCH 2020

Damages — Appeal — Appeal against award — Loss of earning capacity — Claim of future loss of earnings — Sessions court judge awarded future loss of earnings — Whether actual income established — Whether claim and award in accordance with s 28A(2) of the Civil Law Act

This was an appeal against the award for future loss of earnings in an action for negligence arising out of a road accident. The learned SCJ awarded RM211,200 for future loss of earnings after assessing the loss of earnings at RM1,100 a month, which represented the present minimum wage in the country, for 16 years according to the formula provided by s 28A(2) of the Civil Law Act 1956. In making his assessment for loss of future earnings, the SCJ disagreed with the appellants' submissions that no award should be made on the ground that the specialist orthopaedic reports produce by the parties did not state the disabilities were of a nature where the respondent was unable to work at all. The SCJ accepted the opinion of the respondent's consultant orthopaedic surgeon who said that a sedentary job was suitable for the respondent and the opinion of the appellants' own consultant orthopaedic surgeon who said that the respondent would have difficulty operating machines and performing physical labour due to his right hand disability and that currently a sedentary job was suitable for the respondent. The nature of the plaintiff's injury at the wrist of the right hand and the reports adduced showed that there were no other injuries or disabilities. The respondent claimed that because of the disability to his right hand, he had to employ another worker whom he pays RM2,200 a month and claimed that the salary was paid as his loss of future earning.

Held, allowing the appeal and substituting the sessions court order with an award of loss earning capacity:

- (1) It was clear as day that the manner in which the respondent framed his claim and the SCJ made the award was plainly against the provisions of s 28A(2) of the Civil Law Act 1956. The failure to lead evidence as to the respondent's income and his living expenses at the time of the injury as required by s 28A(2) of the Civil Law Act 1956 was fatal. The evidence which was before the court did not discharge the evidential burden of

- A proving income and living expenses. There was no evidence of gross profit, expenses to run the farm and to roll the income for the next crop. Therefore, actual income could not be established. The learned SCJ had applied the wrong principle of law by not adhering to the provisions of sub-s (2) of s 28A of the Civil Law Act 1956. The failure was fatal and
- B court was justified to interfere with the decision according to the established principles. Therefore, the award of loss of future earnings made by the SCJ was set aside (see paras 19–21).
- C (2) The appellant was entitled to be compensated for his loss of earning capacity. There was evidence that the respondent was earning RM1,400 a month. Since the respondent was losing RM1,400 a month for eight months as pre-trial loss of earnings and this amount was not appealed against then court was perfectly entitled to accept the same as the respondent's loss of earnings a month (see para 22).
- D (3) The evidence showed that the respondent went back to work at the farm but says that he was unable to do work that would exert his wrist. The fact that he had gone back to work was evidence that he had suffered loss in his earning capacity. The risk was real and substantial but only the duration was unknown. After taking into account the factors relevant and
- E the fact that the loss of earning capacity are general damages, the respondent was therefore awarded as part of his general damages the loss of earning capacity in the amount of RM50,000 (see paras 23–24).

[Bahasa Malaysia summary]

- F Ini merupakan rayuan terhadap award kehilangan pendapatan akan datang dalam satu guaman untuk kecuaiian yang timbul daripada satu kemalangan jalan raya. Hakim mahkamah sesyen ('HMS') memberi award RM211,200 untuk kehilangan pendapatan akan datang selepas menilai kehilangan pendapatan di kadar RM1,100 sebulan, yang merupakan had gaji minima
- G negara pada waktu ini, untuk tempoh 16 tahun seperti mana formula yang diperuntukkan s 28A(2) Akta Undang-Undang Sivil 1956. Dalam membuat penilaian untuk kehilangan pendapatan akan datang, HMS tidak bersetuju dengan hujahan perayu bahawa tiada award patut diberikan atas alasan laporan pakar ortopedik yang dikemukakan oleh pihak-pihak tidak menyatakan
- H bahawa kecacatan yang dialami mempunyai sifat yang mana responden tidak boleh berkerja langsung. HMS menerima pendapat perunding pakar bedah ortopedik yang mengatakan pekerjaan sedentari adalah sesuai dengan responden dan pendapat perunding pakar bedah orthopaedik perayu sendiri yang menyatakan bahawa responden akan mengalami kesukaran untuk
- I mengendalikan mesin dan melakukan pekerjaan fizikal atas sebab kecacatan tangan kanannya, dan kini pekerjaan sedentari adalah sesuai untuk responden. Sifat kecederaan plaintiff di pergelangan tangan dan laporan yang dikemukakan menunjukkan bahawa tiada kecederaan atau kecacatan lain. Responden menuntut bahawa atas sebab kecederaan kepada tangan kanannya,

dia terpaksa menggaji satu lagi pekerja yang beliau beri upah RM2,200 sebulan dan menuntut bahawa gaji yang dibayar tersebut adalah kehilangan pendapatan akan datangnya.

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Diputuskan, membenarkan rayuan dan menggantikan perintah mahkamah sesyen dengan satu award untuk kehilangan kapasiti pendapatan:

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(1) Adalah jelas bahawa cara yang mana responden mengemukakan tuntutan dan HMS membuat award tersebut adalah bertentangan dengan peruntukan s 28A(2) Akta Undang-Undang Sivil 1956. Kegagalan untuk mengemukakan keterangan berkaitan dengan pendapatan responden dan perbelanjaan hidupnya pada waktu kecederaan seperti yang diperlukan oleh s 28A(2) Akta Undang-Undang Sivil 1956 adalah fatal. Keterangan dihadapan mahkamah tidak melepaskan beban pembuktian untuk membuktikan pendapatan dan perbelanjaan harian. Tiada keterangan keuntungan, perbelanjaan untuk menjalankan ladang dan untuk mendapatkan pendapatan untuk hasil tanaman akan datang. Oleh itu, pendapatan sebenar tidak dapat dibuktikan. HMS telah mengguna pakai prinsip undang-undang yang salah apabila tidak mematuhi peruntukan sub-s (2) s 28A Akta Undang-Undang Sivil 1956. Kegagalan tersebut adalah fatal dan mahkamah mempunyai sebab untuk campur tangan dengan keputusan berlandaskan prinsip mantap. Oleh itu, award kehilangan pendapatan akan datang HMS adalah diketepikan (lihat perenggan 19–21).

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(2) Perayu layak untuk diberi pampasan untuk kehilangan pendapatannya. Dalam kes ini, wujud keterangan bahawa responden mempunyai pendapatan RM1,400 sebulan. Memandangkan responden kehilangan RM1,400 sebulan untuk tempoh lapan bulan sebagai kehilangan pendapatan sebelum perbicaraan dan tiada rayuan berkenaan dengan jumlah ini, maka mahkamah ini berhak untuk menerima perkara ini sebagai kehilangan pendapatan responden untuk tempoh sebulan (lihat perenggan 22).

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(3) Keterangan menunjukkan bahawa responden telah kembali bekerja di ladang tetapi mengatakan bahawa dia tidak boleh melakukan kerja yang akan menggunakan pergelangan tangannya. Fakta bahawa dia telah kembali bekerja adalah keterangan yang dia kehilangan kapasiti pendapatan. Risikonya adalah wujud dan substantif, cuma tempohnya tidak diketahui. Selepas mengambil kira faktor relevan dan fakta bahawa kehilangan kapasiti pendapatan adalah ganti rugi am, responden adalah diberikan award sebagai sebahagian daripada award awam adalah untuk kehilangan kapasiti mendapatkan pendapatan berjumlah RM50,000 (lihat perenggan 23–24).]

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A Cases referred to

Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors [1990] 3 MLJ 103; [1990] 1 CLJ Rep 99, SC (refd)

Looi Gnan Peng v Bay Tong Hai [2005] 1 CLJ 685, CA (refd)

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Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30; [1984] 2 CLJ 163, FC (refd)

Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)

Sumarni v Yow Bing Kwong & Anor [2008] 1 MLJ 608; [2008] 3 CLJ 489, CA (refd)

Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)

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Yang Yap Fong & Anor v Leong Pek Hoon & Anor [1987] 2 MLJ 201; [1987] 1 CLJ 377, SC (refd)

Legislation referred to

Civil Law Act 1956 s 28A, 28A(2)

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Hanis Hidayah (Hawa Hidayah, Farah Dina and Lina Nayar with her) (Murali & Assoc) for the appellants.

N Narendran (Christina Anna Marie with him) (Narendran & Assoc) for the respondent.

E**Amarjeet Singh JC:**

INTRODUCTION

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[1] This is an appeal against the award for future loss of earnings by the learned sessions court judge ('SCJ') in an action for negligence arising out of a road accident.

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[2] It is trite that to succeed in an appeal against an award of damages the appellate court must be satisfied that the trial judge had acted on some wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The appellate court has to determine whether in the circumstances of the case there was either an omission on the part of the trial judge to consider relevant matters, or that irrelevant considerations were taken into account in assessing the award that was made. Only if the appellate court is so satisfied or convinced, is it then justified in interfering with the award that made (see *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 and *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22).

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THE SESSIONS COURT'S DECISION

[3] The SCJ awarded RM211,200 for future loss of earnings after assessing the loss of earnings at RM1,100 a month for 16 years according to the formula

provided by s 28A(2) of the Civil Law Act 1956.

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[4] In making his assessment for loss of future earnings the SCJ disagreed with the appellants' submission that no award should be made on the ground that the specialist orthopaedic reports produced by the parties do not state that the disabilities are of a nature where the respondent is unable to work at all. The SCJ accepted the opinion of the respondent's consultant orthopaedic surgeon who said that a sedentary job is suitable for the respondent and the opinion of the appellants own consultant orthopaedic surgeon who said that the respondent would have difficulty operating machineries and performing physical labour due to his right hand disability and that currently a sedentary job is suitable for the respondent.

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[5] In respect of the amount of loss of earnings, the SCJ agreed with the respondent's submission that the amount of RM1,100 which represents the present minimum wage in the country is appropriate in the circumstances.

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ANALYSIS AND DECISION

[6] A plaintiff whose injuries has caused him to lose his income but for the injuries caused by the defendant is entitled to recover his loss of earnings. He is entitled to claim his pre-trial loss of earnings. These are special damages and must be strictly proven. He is also entitled to recover damages for loss of future earnings and/or loss of earning capacity which are types of post-trial loss of earnings where there is loss of income for the balance of his working life which he would have been able to receive but for his occupational disability. These types of loss of earnings are general damages. Damages for loss of future earnings are governed by s 28A of the Civil Law Act 1956 the requirements of which are mandatory and must be satisfied by evidence led by the plaintiff.

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[7] The relevant parts of s 28A is sub-s (2) provides as follows:

(c) *in awarding damages* for loss of future earnings the Court shall take into account —

- (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury *and was receiving earnings by his own labour or other gainful activity before he was injured;*
- (ii) only the amount relating to his *earnings as aforesaid at the time when he was injured* and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;
- (iii) any diminution of any such amount as aforesaid by such sum *as is proved*

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- A *or admitted to be the living expenses of the plaintiff* at the time when he was injured;
- (d) *in assessing damages* for loss of future earnings the Court shall take into account that:
- B (i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and
- (ii) ...
- C [8] Sub-s (2) of s 28A envisages the situation where the plaintiff is incapable of working after the accident. The provision requires certain elements to be proven by the plaintiff to succeed in a claim for loss of future earnings. The Court of Appeal in *Looi Gnan Peng v Bay Tong Hai* [2005] 1 CLJ 685 and *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608; [2008] 3 CLJ 489
- D established that a claim for loss of future earnings shall not be awarded if any one of the elements that are required by sub-s (2) of s 28A are not satisfied. In that case the plaintiff failed to prove that the plaintiff was in good health but for the injury. The other elements of sub-s (2) of s 28A that must be proven are that the plaintiff was receiving earnings, the amount he was earning and his living
- E expenses at the time he was injured. In my judgment if these statutory elements are not proven a claim for loss of future earnings will not succeed.
- [9] The above position is further supported by the Supreme Court case of *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103;
- F [1990] 1 CLJ Rep 99 which established that it was the intention of the Legislature that in awarding damages for loss of future earnings under s 28A, only the amount that the plaintiff was receiving at the time he was injured can be taken into account in assessing such loss. The court further said that if the plaintiff was not receiving any earnings at that point of time, the plaintiff does
- G not qualify for any award of damages for loss of future earnings.
- [10] The principle governing the manner of proving loss of future earnings was established in the often quoted case of *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30; [1984] 2 CLJ 163 where the Federal Court said
- H that loss of future earnings are awarded for real assessable loss ie loss that is capable of assessment at the date of the trial. The loss must be proved by evidence and not by mere speculation. It was stated that in the absence of such evidence no compensation for loss of future earnings can be made. However, if the court is satisfied that from the evidence before it, the plaintiff has suffered
- I loss of earning capacity then the court will award an appropriate sum as part of the general damages (see *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors*).
- [11] The established test with regards to loss of earning capacity is whether,

sometime in the future, due to the effect of the injuries sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment. The court must be satisfied from the evidence produced that there is a real or substantial risk that his earning capacity will be affected in the future (*Yang Yap Fong & Anor v Leong Pek Hoon & Anor* [1987] 2 MLJ 201; [1987] 1 CLJ 377).

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THE NATURE OF THE PLAINTIFF'S INJURY

[12] Before I proceed to analyse the evidence concerning loss of future earnings it is necessary to identify the nature of the injury that was sustained by the plaintiff. It is undisputed that the respondent had suffered 'perilunate dislocation with fracture triquetrum associated with scapholunate ligament and lunotriquetral ligament tear' which is an injury at the wrist of the right hand.

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[13] The respondent was examined one year after the accident by a consultant orthopaedic surgeon from Lam Wah Ee Hospital who produced a report stating that:

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- (a) the ligament tears had repaired;
- (b) the right arm and right forearm did not reveal any significant muscle atrophy;
- (c) both forearm muscle circumferences measured 25cm;
- (d) right elbow and right hand reveal full range movements of the fingers and power of grip, the supination and pronation was normal; and
- (e) the main incapacity is the pain and severe stiffness on the right wrist which would cause difficulty in performing any form of manual exertion and a sedentary type of occupation for the right hand function would be beneficial to the patient.

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[14] The respondent was then examined by the appellants' own consultant orthopaedic surgeon some two years after the accident who produced a report stating that:

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- (a) there is no muscle wasting over the arm and forearm muscles and that the range of motion of the right shoulder and elbow were full;
- (b) there was limited range of motion on the right wrist;
- (c) the range of motion of all the fingers on the right hand were full and the hand grip power on the right hand was 4/5;

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- A (d) x-ray revealed suture anchor fixation on lunate and triquetral bone which suggest repair of scapholunate and lunotriquetral ligament was done; and
- B (e) the respondent's main incapacity is the pain and stiffness on the right wrist with hand grip weakness and that in view of his occupation as a farmer he would have difficulty in operating machineries and performing physical labour and that the respondent is *currently* only suitable in taking sedentary jobs without much exertion to the right wrist.
- C [15] The reports show that there are no other injuries or disabilities. The respondent is mobile and has full use of his left arm. He can currently do jobs that have not much exertion on his right wrist. This means that he has use of his right hand except that it must not be exerted at the wrist. Most importantly
- D there is no evidence to say that this disability is permanent and for the rest of his working life. The evidence on the other hand, shows that the respondent is in fact capable of non-sedentary work by resuming work at his vegetable farm doing work other than that which exerts his wrist.
- E [16] I observe that the respondent was referred to physiotherapy and occupational therapy at the Seberang Jaya Hospital but there is no report or evidence produced as to the duration of his present disability of pain and stiffness at his wrist, his progress and prognosis.
- F THE PLAINTIFF'S CLAIM FOR LOSS OF FUTURE EARNINGS
- G [17] The evidence shows that the respondent is self-employed as a farmer and grows vegetables such as long beans, okra, cucumbers and red chillies on a rented plot of land under the business name of Lim Mega Tani Enterprise. He works the farm together with five other workers and said that after the accident he returned to work but now only manages the farm and can no longer do any heavy work. He testified that because of the disability to his right hand he had to employ another worker, by the name of Ishak, whom he pays RM2,200 a month. Ishak in his testimony confirmed the respondent's story.
- H [18] The respondent claimed the salary he paid Ishak as his loss of future earnings. The SCJ appeared to accept the respondent's disability as a permanent and a lifelong one and fixed the amount of loss of earnings as the prevailing minimum wage in the country.
- I DECISION
- [19] It is clear as day that the manner in which the respondent framed his claim and the SCJ made the award was plainly against the provisions of sub-s

(2) of s 28A. The notes of proceedings reveals that the respondent's counsel, when the respondent was being cross-examined as to his income, said that there was some confusion on part of the appellants with such questioning as the respondent's claim is merely what he paid Ishak. Thus, the claim by the respondent and the decision of the SCJ has diverged far away from the statutory scheme of loss of future earnings provided by s 28A of the Civil Law Act 1956.

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[20] In my judgment the failure to lead evidence as to the respondent's income and his living expenses at the time of the injury as required by sub-s (2) of s 28A is fatal. The evidence which is before this court in the record of appeal does not discharge the evidential burden of proving income and living expenses. The respondent said that the net income for the enterprise is RM4,000–RM5,000 a month is without any documentary proof. There is no evidence of gross profit, expenses to run the farm and to roll the income for the next crop. Thus, his actual income cannot be established. Surprisingly, the only financial documents he produced were the cash vouchers to prove monthly payment to Ishak. The SCJ who heard the evidence awarded RM1,100 which is based on an irrelevant factor ie minimum wage and not pursuant the scheme of assessing loss of future earning under sub-s (2) of s 28A.

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[21] In the circumstances I hold that the SCJ has applied the wrong principle of law by not adhering to the provisions of sub-s (2) of s 28A of the Civil Law Act 1956. The failure is fatal and this court is justified to interfere with the decision according to the established principles. The award of loss of future earnings made by the SCJ is therefore set aside.

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[22] However, that was not the end of the matter as the appellant is entitled to be compensated for his loss of earning capacity if established by the evidence. In this case there is evidence that the respondent was earning RM1,400 a month. In my judgment if the respondent was losing RM1,400 a month for eight months as pre-trial loss of earnings and this amount was not appealed against then this court is perfectly entitled to accept the same as the respondent's loss of earnings a month.

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[23] The evidence shows that the respondent went back to work at the farm but says that he is unable to do work that would exert his wrist. The fact that he has gone back to work is evidence that he has suffered loss in his earning capacity. The risk is real and substantial but only the duration is unknown. The prospects of the respondent is bright taking into account that the appellants' consultant orthopaedic surgeon said that the respondent could currently do only sedentary jobs. This in my view is indication as to the physical ability of the plaintiff to work in the future.

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A [24] After taking into account the above factors and the fact that loss of earning capacity are general damages I therefore award the respondent as part of his general damages the loss of his earning capacity in the amount of RM50,000.

B CONCLUSION

C [25] In conclusion, I would allow this appeal with no order as to costs. The order of the sessions court in respect of loss of future earnings is set aside and substituted with an award of loss of earning capacity as indicated above to form part of the respondent's general damages.

Appeal allowed with no order as to costs; sessions court order set aside and substituted with an award of loss of earning capacity.

D Reported by Izzat Fauzan

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